INDEX

OPINIONS BELOW 4
JURISDICTION 4
DATE OF JUDGMENT 4
ORDER DENYING REHEARING 4
STATUTORY JURISDICTION 4
QUESTION PRESENTED 4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4
CONCISE STATEMENT OF CASE 5
REASONS FOR GRANTING THE WRIT 6
CONCLUSION 7

TABLE OF CITATIONS

United States Constitution, Amendment VI

West Virginia Constitution, Article III, Section 14

West Virginia Code 61-11-12

United States Constitution, Amendment XIV

Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)

Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252 ,86 L. Ed. 1595 (1942)

Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932)

APPENDIX

Supreme Court

OF THE

United States

DONALD G. WILLIS,
Petitioner,

vs.

THOMAS P. O'BRIEN, Judge
of the Intermediate Court
of Ohio County, West Virginia
Respondent.

Petition for a Writ of Certiorari to
the Supreme Court of Appeals of
the State of West Virginia

To the Honorables the Justices of the United States Supreme Court

Donald G. Willis, Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Appeals of the State of West Virginia.

(a) OPINIONS BELOW

The opinion of the Supreme Court of Appeals of the State of West Virginia, filed February 28, 1967, (Appendix and Record, hereinafter called A.&R., 29-33) W. Va. , 153 S.E. 2d 178 (1967).

The opinion of the Circuit Court of Ohio County, West Virginia, filed October 22, 1965. (A.&R. 21-25)

(b) JURISDICTION

(i) DATE OF JUDGMENT

The Judgment of the Supreme Court of Appeals of West Virginia sought to be reviewed was entered on February 28, 1967. (A.&R. 34)

(ii) ORDER DENYING REHEARING

The Order of the Supreme Court of Appeals of the State of West Virginia denying the Petition for rehearing filed by the Petitioner was entered May 29, 1967. (A.&R. 42)

(iii) STATUTORY JURISDICTION

The Jurisdiction of the Court is invoked under 28 U.S.C.A. 1257 (3).

(c) QUESTION PRESENTED

Whether West Virginia Code 61-11-12 violates Amendments VI and/or XIV of the Constitution of the United States.

(d) CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shalll have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of

the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

West Virginia Constitution, Article III, Section 14:

Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, and in the county where the alleged offence was committed unless upon petition of the accused, and for good cause shown, it is removed to some other county. In all such trials, the accused shall be fully and plainly informed of the character and cause of the accusation, and be confronted with the witnesses against him, and shall have the assistance of counsel, and a reasonable time to prepare for his defence; and there shall be awarded to him compulsory process for obtaining witnesses in his favor.

West Virginia Code 61-11-12:

If a mortal wound or other violence or injury be inflicted, or poison be administered, in one county, and death ensue therefrom in another county, the offense may be prosecuted in either.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(e) CONCISE STATEMENT OF CASE

On the 29th day of April, 1965, Petitioner was indicted by a Grand Jury of the State of West Virginia attending the Intermediate Court of Ohio County, West Virginia. (A.&R. 11, 12)

The indictment charged Petitioner with murder caused by an illegal abortion performed not in Ohio County, West Virginia, but in Brooke County, West Virginia. (A.&R. 11, 15)

Petitioner, by Pleas in Abatement, raised the State and Federal Constitutional objections to the jurisdiction of the Intermediate Court of Ohio County to try the Petitioner (A.&R. 12) urging that the only jurisdiction to try the Petitioner lay in Brooke County, West Virginia, where the alleged crime was committed. (A.&R. 13)

These Pleas were all overruled. (A.&R. 15, 16)

Petitioner sought a Writ of Prohibition in the Circuit Court of Ohio County, West Virginia. (A.&R. 11-18)

His application was denied. (A.&R. 26)

He appealed the denial to the Supreme Court of Appeals of the State of West Virginia. (A.&R. 1-8)

The said Supreme Court of Appeals affirmed on February 28, 1967. (A.&R. 34)

Within time Petitioner sought a rehearing (A.&R. 35-41) which was refused on May 29, 1967. (A.&R. 42)

REASONS FOR GRANTING THE WRIT

This Court, in *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) reviewed its holding in *Betts* v. *Brady*, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942) and stated particularly that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the states by the Fourteenth Amendment. The Court goes on to hold that the "Sixth Amendment's guarantee of counsel is . . . one of those fundamental rights". The decision reversed *Betts* v. *Brady* and upheld *Powell* v. *Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

We submit that the provision of the Sixth Amendment that "the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, . . ." is likewise a provision of the Bill of Rights which is "fundamental and essential to a fair trial" and made obligatory upon the states by the Fourteenth Amendment.

The district "previously ascertained by law" for the trial of criminal prosecutions in West Virginia was ascertained by West Virginia Constitution, Article III, Section 14, which reads as follows:

> Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, *and in the county where the alleged offence was committed* . . (emphasis added)

The Legislature of the State of West Virginia passed West Virginia Code 61-11-12, reading as follows:

> If a mortal wound or other violence or injury be inflicted, or poison be administered, in one county, and death ensue therefrom in another county, the offense may be prosecuted in either.

This statute of the Legislature of the State of West Virginia is unconstitutional in that it strips from an accused under this section "fundamental and essential" rights as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

The Supreme Court of Appeals of the State of West Virginia wrongly upheld this unconstitutional statutory provision. (A.&R. 29-34).

CONCLUSION

We submit that the Supreme Court of Appeals of West Virginia has decided a federal constitutional question of

substance not heretofore determined by this Court and in a way not in accord with applicable decisions of this Court.

Respectfully submitted,

Pinsky, Mahan, Barnes & Watson
736 Charles Street
Wellsburg, West Virginia

McCamic & McCamic
56 - 14th Street
Wheeling, West Virginia
Counsel for Petitioner

NO. 12555

IN THE

SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

CHARLESTON

DONALD G. WILLIS,
Petitioner,

vs. : Prohibition.

THOMAS P. O'BRIEN, Judge of the Intermediate Court of Ohio County, West Virginia,
Respondent.

FROM THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

PETITON OF DONALD G. WILLIS FOR WRIT OF ERROR AND SUPERSEDEAS

To the Honorables, the Judges of the Supreme Court of Appeals of West Virginia:

Your petitioner, Donald G. Willis, respectfully represents that he is aggrieved by a final judgment of the Circuit Court of Ohio County, West Virginia, rendered against him by dismissing the Petition of the Petitioner for a Writ of Prohibition by an Order dated the 22nd day of October, 1965, in an action seeking a Writ of Prohibition in the Circuit

Court of Ohio County, which action is styled: Donald G. Willis, Petitioner v. Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia.

Your petitioner files herewith and asks that the same be read and considered as a part of this Petition, the original record of said prohibition suit arranged and indexed by the Clerk of the Circuit Court of Ohio County, West Virginia, as required by law.

PROCEEDINGS AND STATEMENT OF THE CASE

The Grand Jurors of the State of West Virginia in and for the body of the County of Ohio attending the Intermediate Court of the said County on the 29th day of April, 1965, returned an indictment against the petitioner, Donald G. Willis, in the following form, to wit:

> "The Grand Jurors of the State of West Virginia, in and for the body of the County of Ohio, and now attending the Intermediate Court of the said County, upon their oaths present that Donald G. Willis on the 23rd day of March, in the year of our Lord one thousand nine hundred and sixty-five (1965), in the said County of Ohio feloniously, wilfully, malicously, deliberately and unlawfully did slay, and kill, and murder one Evelyn Riedel Sherman, in that on the 22nd day of March, 1965, in Brooke County, West Virginia, the said Donald W. Willis did feloniously, wilfully and unlawfully employ and use upon the body of the said Evelyn Riedel Sherman, a female person, who was then and there pregnant with child, certain means, the character and description of which are to the grand jurors aforesaid unknown, with intent then and there to destroy such unborn child of the said Evelyn Riedel Sherman, and to produce the abortion and miscarriage of the said Evelyn Riedel Sherman: and that the said Donald G. Willis, then and there and by the means aforesaid did feloni-us-

ly, wilfully and unlawfully destroy such unborn child and produce such adortion and miscarriage of the said Evelyn Riedel Sherman, the same not being then and there done by the said Donald G. Willis, in good faith with the intention of saving the life of said Evelyn Riedel Sherman or that of her said unborn child, and by reason of such abortion performed on her the said Evelyn Riedel Sherman did die in Ohio County, West Virginia, on the 23rd day of March, 1965, against the peace and dignity of the State."

That on the 28th day of May, 1965, the petitioner filed a Plea in Abatement to the Jurisdiction of the Court as Violative of the Constitution of the United States of America and the State of West Virginia, and said Plea in Abatement was filed by Order of the Intermediate Court of Ohio County, West Virginia, on the 28th day of May, 1965, which Plea in Abatement and Order are as follows:

"PLEA IN ABATEMENT TO THE JURISDICTION OF THE COURT AS VIOLATIVE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND THE STATE OF WEST VIRGINIA.

"The said Defendant, Donald G. Willis, in his own proper person, comes and says that this Court ought not to have or take any further cognizance of the action aforesaid. Since the Defendant is entitled to a trial by a jury of his peers in the community in which the alleged crime was committed, the said Defendant says that any attempt to try him in Ohio County, State of West Virginia, of the alleged crime that was purportedly committed in Brooke County, West Virginia, is a violation of his constitutional rights under the Constitution of the United States of America and under the Constitution of the State of West Virginia; and this the Defendant is ready to verify.

"WHEREFORE, he prays judgment whether this

Court can or will take any further cognizance of the action aforesaid."

"ORDER FILING PLEA IN ABATEMENT TO THE JURISDICTION OF THE COURT AS VIOLATIVE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND THE STATE OF WEST VIRGINIA.

"This 28th day of May, 1965, came the Defendant, in person and by his attorneys, Messrs. Pinsky, Mahan, Barnes & Watson, and Messrs. McCamic and Tinker, and presented for filing his Plea in Abatement to the Jurisdiction of the Court as Violative of the Constitution of the United States of America and the State of West Virginia.

"And there being no objection thereto, IT IS, ACCORDINGLY, ORDERED FILED."

That on the 28th day of May, 1965, the petitioner filed a Plea in Abatement to the Jurisdiction of the Court on the question of venue, and said Plea in Abatement was filed by Order of the Intermediate Court of Ohio County, West Virgina, on the 28th day of May, 1965, which Plea in Abatement and Order are as follows:

"PLEA IN ABATEMENT TO JURISDICTION OF THE COURT

"The said Defendant, Donald G. Willis, in his own proper person, comes and says that this Court ought not to have or take any further cognizance of the act aforesaid because the indictment returned by the Grand Jury of the State of West Virginia in and for the body of the County of Ohio, fails to set forth that any mortal wound or other violence or injury or poison was inflicted or administered in Brooke County.

"The said Defendant says that the alleged crime

as stated in the indictment was committed in Brooke County, West Virginia, and therefore that the Circuit Court of Brooke County alone has jurisdiction to try this action.

"And this the Defendant is ready to verify.

"WHEREFORE, he prays judgment whether this judgment can or will take any further cognizance of the action aforesaid."

"ORDER FILING PLEA IN ABATEMENT TO JURISDICTION OF THE COURT

"This 28th day of May, 1965, came the Defendant, in person and by his attorneys, Messrs. Pinsky, Mahan, Barnes & Watson, and Messrs. McCamic and Tinker, and presented for filing his Plea in Abatement to Jurisdiction of the Court.

"And there being no objection thereto, IT IS, ACCORDINGLY, ORDERED FILED."

It is further respectfully represented that by Order entered on the ..... day of July, 1965, by the Judge of the Intermediate Court of Ohio County, West Virginia, the Plea in Abatement to the Jurisdiction of the Court as Violative of the Constitution of the United States of America and the State of West Virginia, and the Plea in Abatement to Jurisdiction of the Court were overruled and denied, to which action of the Court the petitioner objected and excepted. A copy of said Order is as follows:

"ORDER

"This 14th day of June, 1965, came the defendant, Donald G. Willis, in person and by his counsel, Messrs. Pinsky, Mahan, Barnes & Watson and Mesars. McCamic and Tinker, and came the State of West Virginia, by Ronald W. Kasserman, Assistant Prosecuting Attorney of Ohio County, West Virginia, that

being the date set for hearing further arguments on the Plea in Abatement to Jurisdiction of the Court, the Plea in Abatement to Jurisdiction of the Court as Violative of the Constitution of the United States of America and the State of West Virginia, the Plea in Abatement for Indefiniteness and Duplicity, and the Plea in Abatement for Prejudicial Conduct of the Prosecuting Attorney.

"WHEREUPON, counsel for the defendant moved the Court to place in the record that the Assistant Prosecuting Attorney, in arguing against the Plea in Abatement to Jurisdiction of the Court on the question of venue, stated that the State had alleged in the indictment that the abortion happened in Brooke County.

"WHEREUPON, IT IS ORDERED that the statement of the Assistant Prosecuting Attorney, to the effect that the State had alleged in the indictment that the abortion happened in Brooke County, be made part of the record.

"WHEREUPON, after hearing arguments of counsel, the Court is of the opinion and doth ORDER that:

"(1) The Plea in Abatement to Jurisdiction of the Court is overruled and denied, to which action of the Court the defendant objects and excepts.

"(2) The Plea in Abatement for Indefiniteness and Duplicity is overruled and denied, to which action of the Court the defendant objects and excepts.

"(3) The Plea in Abatement for Prejudicial Conduct of the Prosecuting Attorney is overruled and denied, to which action of the Court the defendant objects and excepts.

"(4) The Plea in Abatement to Jurisdiction of the Court is Violative of the Constitution of the United States of America and the State of West Virginia is overruled and denied, to which action of the Court the defendant objects and excepts.

It is further respectfully represented that your petitioner filed a Petition for Writ of Prohibition in the Circuit Court of Ohio County, West Virginia, on the 30th day of August, 1965, and that on the 30th day of August, 1965, the Circuit Court of Ohio County, West Virginia, issued a rule to show cause why the Writ of Prohibition should not be granted.

Itt is further represented to the Honorable Court that on the 22nd day of October, 1965, the Circuit Court of Ohio County, West Virginia, entered a Final Order danying the prayer of the Petition for a Writ of Prohibition and dismissing the Petition to which action of the Court the petitioner objected and excepted.

It is further respectfully represented to the Honorable Court that your petitioner filed a Notice of Intent to Appeal to this Honorable Court on the 20th day of December, 1965, setting forth the grounds for his Petition.

ASSIGNMENTS OF ERROR

(1) Under the Constitution of the State of West Virginia, your petitioner is entitled to a trial in the county where the alleged offense was committed. The indictment hereinbefore set forth alleges that the only aet committed by the defendant was in Brooke County, West Virginia.

(2) That under the Constitution of the United States of America, your petitioner is entitled to a trial in the district where the alleged offense was committed. The indictment hereinbefore set forth alleges that the only act committed by the defendant was in Brooke County, West Virginia.

(3) That the State of West Virginia is attempting to prosecute your petitioner under Chapter 61, Article 11, Section 12 of the West Virginia Code of 1961, Michie's Code, Serial No. 6124. That this venue statute of the State of West Virginia attempting to give jurisdiction of a prosecution to the courts of a county where the offense was not committed is unconstitutional and void.

(4) That the Legislature of the State of West Virginia, in enacting Chapter 61, Article 11, Section 12 of the West Virginia Code of 1961, Michie's Code, Serial No. 6124, contemplated crimes of violence where the injury is inflicted in one county and death ensues in another. The alleged crime charged in the indictment in this case is not a crime of this nature.

(5) The attempt to proceed by the Intermediate Court of Ohio County in this matter is a usurpation and abuse of power and exceeds the Court's powers therein, and that the Intermediate Court of Ohio County is wholly without jurisdiction to act further in said case.

(6) The Circuit Court of Ohio County erred in refusing the prayer of the Writ of Prohibition and in dismissing the case.

WHEREFORE, your petitioner prays for writ of error and supersedeas from the final decree aforesaid denying the prayer of the Petition for Writ of Prohibition and dismissing the Petition, and prays that said Order of said Circuit Court of Ohio County, West Virginia, dated the 22nd day of October, 1965, be reviewed, reversed and set aside; and that the Circuit Court of Ohio County be ordered to grant the prayer of the Petition for Writ of Prohibition prohibiting Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, from proceeding further in said action, and from trying the same; and that all proceedings be stayed pending the final outcome of this Writ of Error; and that Your Honors will enter or direct the entry of such order as shall be proper herein.

Respectfully submitted,

PINSKY, MAHAN, BARNES &
WATSON AND
McCAMIC and McCAMIC
By: RICHARD W. BARNES
Counsel for Petitioner.

CERTIFICATE

State of West Virginia,
County of Ohio, to-wit:

I, W. H. Havercamp, Clerk of the Circuit Court of Ohio County, State aforesaid, hereby certify that deposit has been made to guarantee costs of the preparation and indexing of the record, fees for filing the petition, and making and certifying necessary copies of orders, costs of transmission and return of the record, and the making of a transcript of the record in case a writ of error and supersedeas be allowed in the within action lately pending in said Circuit Court.

I further certify that petition to the Supreme Court of Appeals in the within action has been filed in duplicate in my office, the duplicate remaining therein on file.

Given under my hand and the seal of said Court, this 18th day of January, 1966.

W. H. HAVERCAMP
Clerk of the Circuit Court of Ohio
County, West Virginia

(Seal Circuit Court Ohio Co., W. Va.)

Filed January 18, 1966. W. H. Havercamp, Clerk, Circuit Court of Ohio County.

Filed January 20, 1966. Kenneth E. Hines, Clerk of the Supreme Court of Appeals of West Virginia.

State of West Virginia, to-wit:

The writ of error and supersedeas prayed for in the foregoing petition was allowed on the 28th day of February, 1966. No Bond is required.

Attest: KENNETH E. HINES,
Clerk Supreme Court of Appeals.

STIPULATION OF DESIGNATED PARTS OF RECORD

It is hereby stipulated and agreed by and between Donald G. Willis, Petitioner and Appellant herein and Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, Respondent and Appellee herein, that the following designated parts of the record in this proceeding are considered material to the questions presented upon this appeal and should, therefore, be printed as part of the transcript herein:

(1) Petition for Writ of Prohibition;

(2) Order filing Petition for Writ of Prohibition and issuing Rule to Show Cause dated August 30, 1965;

(3) Demurrer to the Petition;

(4) Order filing Demurrer dated September 23, 1965;

(5) Order of September 23, 1965. submitting issues raised by demurrer;

(6) Order entered October 22, 1965, sustaining Demurrer and Memorandum of James G. McClure, Judge of the Circuit Court of Ohio County, West Virginia, in support thereof.

(7) Petitioner's Notice of intent to file Petition for appeal.

JEREMY C. McCAMIC
Of Counsel for Petitioner-Appellant

RONALD W. KASSERMAN
Of Counsel for Respondent-Appellee

RECORD

In the Circuit Court of Ohio County, West Virginia.

Donald G. Willis, Petitioner,
v. :: Prohibition.
Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, Respondents.

PETITION FOR WRIT OF PROHIBITION

To: The Honorable James G. McClure,
Judge of the Circuit Court of
Ohio County, West Virginia.

The undersigned petitioner respectfully represents unto the Court that:

The Grand Jurors of the State of West Virginia in and for the body of the County of Ohio attending the Intermediate Court of the said County on the 29th day of April, 1965, returned an indictment against the petitioner, Donald G. Willis, in the following form, to-wit:

"The Grand Jurors of the State of West Virginia, in and for the body of the County of Ohio, and now attending the Intermediate Court of the said
page 2] County, upon their oaths present that Donald G. Willis on the 23rd day of March, in the year of our Lord one thousand nine hundred and sixty-five (1965), in the said County of Ohio feloniously, wilfully, maliciously, deliberately and unlawfully did slay and kill, and murder one Evelyn Riedel Sherman, in that on the 22nd day of March, 1965, in Brooke County, West Virginia, the said Donald G. Willis did feloniously, wilfully and unlawfully employ and use upon the body of the said Evelyn Riedel Sherman, a female person, who was then and there pregnant with child, certain means, the character and description of which are to the grand jurors

aforesaid unknown, with intent then and there to destroy such unborn child of the said Evelyn Riedel Sherman, & to produce the abortion and miscarriage of the said Evelyn Riedel Sherman; and that the said Donald G. Willis, then and there and by the means aforesaid did feloniously, wilfully and unlawfully destroy such unborn child and produce such abortion and miscrriage of the said Evelyn Riedel Sherman, the same not being then and there done by the said Donald G. Willis, in good faith with the intention of saving the life of said Evelyn Riedel Sherman or that of her said unborn child, and by reason of such abortion performed on her the said Evelyn Riedel Sherman did die in Ohio County, West Virginia, on the 23rd day of March, 1965, against the peace and dignity of the State."

That on the 28th day of May, 1965, the petitioner filed a Plea in Abatement to the Jurisdiction of the Court as Violative of the Constitution of the United States of America and the State of West Virginia, and said Plea in Abatement was filed by Order of the Intermediate Court of Ohio County, West Virginia, on the 28th day of May, 1965, which Plea in Abatement and Order are as follows:

"PLEA IN ABATEMENT TO THE JURISDICTION OF THE COURT AS VIOLATIVE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICT AND THE STATE OF WEST VIRGINIA

"The said Defendant, Donald G. Willis, in his own proper person, comes and says that this Court ought not to have or take any further cognizance of the action aforesaid. Since the Defendant is entitled to a trial by a jury of his peers in the community in which the alleged crime was committed, the said Defendant says that any attempt to try him in Ohio County,

page 3] State of West Virginia, of the alleged crime that

was purportedly committed in Brooke County, West Virginia, is a violation of his constitutional rights under the Constitution of the United States of America and under the Constitution of the State of West Virginia; and this the Defendant is ready to verify.

"WHEREFORE, he prays judgment whether this Court can or will take any further cognizance of the action aforesaid."

"ORDER FILING PLEA IN ABATEMENT TO THE JURISDICTION OF THE COURT AS VIOLATIVE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND THE STATE OF WEST VIRGINIA

"This 28th day of May, 1965, came the Defendant, in person and by his attorneys, Messrs. Pinsky, Mahan, Barnes & Watson, and Messrs. McCamic and Tinker, and presented for filing his Plea in Abatement to the Jurisdiction of the Court as Violative of the Constitution of the United States of America and the State of West Virginia.

"And there being no objection thereto, IT IS. ACCORDINGLY, ORDERED FILED."

That on the 28th day of May, 1965, the petitioner filed a Plea in Abatement to the Jurisdiction of the Court on the question of venue, and said Plea in Abatement was filed by Order of the Intermediate Court of Ohio County, West Virginia, on the 28th day of May, 1965, which Plea in Abatement and Order are as follows:

"PLEA IN ABATEMENT TO JURISDICTION OF THE COURT

"The said Defendant, Donald G. Willis, in his own proper person, comes and says that this Court ought not to have or take any further cognizance of

the act aforesaid because the indictment returned by the Grand Jury of the State of West Virginia in and for the body of the County of Ohio, fails to set forth that any mortal wound or other violence or injury
page 4] or poison was inflicted or administered in Brooke County.

"The said Defendant says that the alleged crime as stated in the indictment was committed in Brooke County, West Virginia, and therefore that the Circuit Court of Brooke County alone has jurisdiction to try this action.

"And this the Defendant is ready to verify.

"WHEREFORE, he prays judgment whether this judgment can or will take any further cognizance of the action aforesaid."

"ORDER FILING PLEA IN ABATEMENT TO JURISDICTION OF THE COURT

This 28th day of May, 1965, came the Defendant, in person and by his attorneys, Messrs. Pinsky, Mahan, Barnes & Watson, and Messrs. McCamic and Tinker, and presented for filing his Plea in Abatement to Jurisdiction of the Court.

"And there being no objection thereto, IT IS ACCORDINGLY, ORDERED FILED."

It is further respectfully represented that by Order entered on the ..... day of July, 1965, by the Judge of the Intermediate Court of Ohio County, West Virginia, the Plea in Abatement to the Jurisdiction of the Court as Violative of the Constitution of the United States of America and the State of West Virginia, and the Plea in Abatement to Jurisdiction of the Court were overruled and denied, to which action of the Court the petitioner objected and excepted. A copy of said Order if as follows:

"ORDER

"This 14th day of June, 1965, came the defendant, Donald G. Willis, in person and by his counsel, Messrs. Pinsky, Mahan, Barnes & Watson and Messrs. McCamic and Tinker, and came the State of West Virginia, by Ronald W. Kasserman, Assistant Prosecuting Attorney of Ohio County, West Virginia, that being the date set for hearing further arguments on the Plea in Abatement to Jurisdiction of the Court, the Plea in Abatement to Jurisdiction of the Court as
page 5] Violative of the Constitution of the United States of America and the State of West Virginia, the Plea in Abatement for Indefiniteness and Duplicity, and the Plea in Abatement for Prejudicial Conduct of the Prosecuting Attorney.

"WHEREUPON, counsel for the defendant moved the Court to place in the record that the Assistant Prosecuting Attorney, in arguing against the Plea in Abatement to Jurisdiction of the Court on the question of venue, stated that the State had alleged in the indictment that the abortion happened in Brooke County.

"WHEREUPON, IT IS ORDERED that the statement of the Assistant Prosecuting Attorney, to the effect that the State had alleged in the indictment that the abortion happened in Brooke County, be made part of the record.

"WHEREUPON, after hearing arguments of counsel, the Court is of the opinion and doth ORDER that:

"(1) The Plea in Abatement to Jurisdiction of the Court is overruled and denied, to which action of the Court the defendant objects and excepts.

"(2) The Plea in Abatement for Indefiniteness and Duplicity is overruled and denied, to which action of the Court the defendant objects and excepts.

"(3) The Plea in Abatement for Prejudicial Conduct of the Prosecuting Attorney is overruled and

denied, to which action of the Court the defendant objects and excepts.

"(4) The Plea in Abatement to Jurisdiction of the Court as Violative of the Constitution of the United States of America and the State of West Virginia is overruled and denied, to which action of the Court the defendant objects and excepts."

Your petitioner further says that Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, has set October ....., 1965, as the date for trial of the State of West Virginia, Plaintiff, v. Donald G. Willis, Defendant, your petitioner, and is proceeding to take jurisdiction of the cause.

Your petitioner further says that the Constitu-
page 61 tion of West Virginia, Article III, Section 14, is as follows:

"Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, and in the county where the alleged offense was committed, unless upon the petition of the accused, and for good cause shown, it is removed to some other county x x x"

It is respectfully represented to the Court that under the Constitution of the State of West Virginia, your petitioner is entitled to a trial in the County where the alleged offense was committed. The indictment hereinbefore set forth alleges that the only action committed by the defendant was in Brooke County, West Virginia.

Your petitioner further respectfully represents that the State of West Virginia is attempting to prosecute your petitioner under Chapter 61, Article 11, Section 12 of the West Virginia Code of 1961, Michie's Code Serial No. 6124, which is as follows:

"If a mortal wound or other violence or injury be inflicted, or poison be administered in one county,

and death ensue therefrom in another county, the offense may be prosecuted in either."

Your petitioner represents that under a constitutional provision that the defendant is entitled to a trial by a jury of the county in which the offense is committed, a statute giving jurisdiction of a prosecution to the courts of another county is void and unconstitutional.

In addition, your petitioner represents that the Legislature of the State of West Virginia, in enacting Chapter 61, Article 11, Section 12 of the West Virginia Code of 1961, Michie's Code Serial No. 6124, contemplated crimes of violence where the injury is inflicted in one county and death ensues in another. The crime charged in the
page 7] indictment is not a crime of this nature and venue is improperly laid in Ohio County.

Your petitioner says that the attempt by Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, to proceed with the trial in this matter is a usurpation and abuse of his power as such Judge and exceeds his powers therein; and that he is wholly without jurisdiction to act further in said case.

Your petitioner further says that the said Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, will continue to usurp and abuse his power as such Judge and exceed his powers in this case by proceeding to take jurisdiction and try your petitioner unless he s prohibited from so doing by the lawful possession of this Court.

Your petitioner therefore prays that the rule may be awarded against the said Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, to show cause, if he can, why a writ of prohibition should not be awarded to your petitioner prohibiting the said Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, from proceeding further in said action and from trying the same, so that the said Order entered by

Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, rendered on the ..... day of July, 1965, overruling and denying said Plea in Abatement to the Jurisdiction of the Court as Violative of the Constitution of the United States of America and the State of West Virginia against this petitioner, will be reversed.

DONALD G. WILLIS, Petitioner,
/s/ By: Richard W. BARNES
Of Messrs. Pinsky, Mahan, Barnes & Watson and Messrs. McCamic & Tinker.

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page 81 State of West Virginia,
County of Brooke, to-wit:

Donald G. Willis, the petitioner named in the foregoing Petition, being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and that, so far as they are therein stated to be on information, he believes them to be true.

/s/ DONALD G. WILLIS

Taken, sworn to and subscribed before me this 30th day of August, 1965. My commission expires: March 15, 1975.
/s/ RICHARD W. BARNES
Notary Public

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page 91 ORDER FILING PETITION FOR A WRIT OF PROHIBITION AND ISSUING RULE TO SHOW CAUSE

This 30th day of August, 1965, Donald G. Willis, the petitioner, presented his Petition to the Court, duly verified, praying that a writ of prohibition be awarded against Thomas

P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, to show cause, if he can before this Court, why a writ of prohibition should not be awarded prohibiting the said Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, from proceeding to try the case of State of West Virginia, Plaintiff, v. Donald G. Willis, Defendant, Indictment No. F-54, Indictment for a Felony, and proceeding further in said action, which Petition is now here filed.

It further appearing that said Petition estab-
page 10] lishes a prima facie case, it is therefore OR-
DERED that a rule issue directed against the said Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, commanding him to appear at the bar of this Court on the 23rd day of September, 1965, at the hour of 9:30 o'clock a. m., E.D.S.T., to show cause, if he can, why a preemptory writ of prohibition should not be awarded prohibiting the said Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, from proceeding further in said action and from trying the same so that the said Order entered by Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, rendered on the ..... day of July, 1965, overruling and denying said Plea in Abatement to the Jurisdiction of the Court as Violative of the Constitution of the United States of America and the State of West Virginia, and overruling and denying said Plea in Abatement to Jurisdiction of the Court against this petitioner will be reversed.

It is further ORDERED that a copy of said Petition filed by the said Donald G. Willis, petitioner, be served upon the said Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, at the same time and in the same manner if the said rule shall be served.

It is further ORDERED that a certified copy of this Order be served upon the said Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, and that it shall have the same force and effect as service of the formal rule herein provided.

x x x

page 111 DEMURRER

The respondent, Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, says that the Petition for the Writ of Prohibition, dated the 30th day of August, 1965, is not sufficient in law for the following reasons:

1. That Chapter 61, Article 11, Section 12, of the Code of West Virginia of 1931, as amended, is not limited to any specific type of homicide and therefore encompasses the crime as alleged in the indictment in the case of State of West Virginia, Plaintiff, versus Donald G. Willis, Defendant, F-54, in the Intermediate Court of Ohio County, West Virginia.

2. That the crime of murder, or other crimes resulting from a homicide, contains two or more specific acts, namely, in this case, the injury and death. That Chapter 61, Article 11, Section 12, of the Code of West Virginia of 1931, as amended, places the venue for said crime in either the County where the mortal wound, violence, or injury was inflicted, or in the County where death occurred

page 112 and therefore does not violate Article III, Section 14, of the Constitution of the State of West Virginia.

3. For other reasons apparent on the face of said Petition.

ARCH W. RILEY
Attorney for Thomas P. O'Brien
Judge of the Intermediate Court of
Ohio County, West Virginia.

I, Arch W. Riley, an Attorney at law practicing before the Bar of Ohio County, West Virginia, do hereby certify that this Demurrer is filed in good faith and not merely for reasons of delay.

ARCH W. RILEY

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page 13] ORDER

On this the 23rd day of September, 1965, came the respondent, Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, by Arch W. Riley, Prosecuting Attorney of Ohio County, West Virginia, and tendered for filing his Demurrer to the Petition of Donald G. Willis, filed in this action, which said Demurrer is hereby ORDERED filed by the Court.

x x x

page 14] ORDER

On the 23rd day of September, 1965 came the petitioner, Donald G. Willis, in person, and by his counsel, Abraham Pinsky, R. W. Barnes, and Jeremy C. McCamic, and also came the respondent, Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, by his counsel, Arch W. Riley, Prosecuting Attorney of Ohio County, West Virginia, in compliance to a rule hitherto issued by this court, returnable to the 23rd day of September, 1965.

Whereupon the issues raised by the demurrer hitherto filed were orally argued, and briefs were submitted in support of the respective contentions of the parties hereto, and the matters arising upon the said demurrer were submitted to the court for decision.

x x x

page 15] COURT MEMORANDUM

This is a Petition for a Writ of Prohibition against Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County from proceeding upon an indictment found against the Petitioner by a special term of the Grand Jury of Ohio County, West Virginia. To this Petition, the State has demurred.

Petitioner is accused in the indictment of having feloniously, willfully, etc. slayed and murdered Evelyn Riedel Sherman in that he had in Brooke County, West Virginia feloniously and unlawfully employed and used upon the body of the decedent, who was then pregnant, certain means, the character and description of which are unknown, with intent to destroy the unborn child of the decedent and to produce an abortion and miscarriage upon her; and that the Petitioner by the means aforesaid did feloniously, unlawfully, etc. destroy the unborn child and did produce an abortion and miscarriage upon the decedent not in good faith with the intention of saving defendant's life or that of her unborn child; and that, by reason of the abortion performed on the said decedent, she died in Ohio County on the 23rd day of March, 1965.

page 16] Petitioner contends in essence that the proper venue for the trial of the crime with which he is charged is in Brooke County and is not in Ohio County, inasmuch as the indictment alleges that the unlawful means were used in Brooke County; and further that the place of death of decedent cannot legally place jurisdiction for this alleged crime in the courts of Ohio County.

First of all, it should be borne in mind that the crime for which Petitioner was indicted is controlled by statute. Abortion at common law was a misdemeanor. Under our statute, it is a felony. Where death ensues, our statute makes such crime a felony and provides that a person who commits it shall be guilty of murder in the second degree.

There can be no doubt that the generally accepted view in the case of murder is that venue lies, in the absence of statute in the county where the mortal wound was inflicted. Citation of authority to this effect is deemed unnecessary.

This indictment is brought under West Virgina Code §6124 which is as follows:

> "If a mortal wound or other violence or injury be inflicted, or poison be administered in one county and death ensue therefrom in another county, the offense may be prosecuted in either."

It is contended by Petitioner that there are insufficient facts alleged in the indictment upon which to lay venue in Ohio County. Under this Code provision, it is contended that the indictment, to be sufficient, must allege that a "mortal wound or other violence or injury was inflicted" in Brooke County, and that because the only allegation in the indictment is that the Petitioner did feloniously and unlawfully "employ and use" upon the body of the decedent certain means, the character of which was unknown

page 17] to the Grand Jurors, this indictment does not comply with the requirements of the law as to venue under the Code provision. It is contended that, under this wording, it would be impossible to infer that a mortal wound or other violence or injury was inflicted. The words used in this indictment are those contained in the statute, Section 5923 of the Code. I believe them to be sufficient in regard to the crime charged.

Petitioner further argues that the word "inflicted" must, of necessity, imply that there was an exercise of the will and cites certain life insurance cases in support of this theory. I agree that, for the purpose of the proper interpretation of life insurance contracts, this is true; but I do not believe that it is a proper construction of the word as used in the statute upon which the State relies for venue in Ohio County. I would rather accept the definition as contained in the case of Commonwealth v. Macloon, 101 Mass. 1, which, interpreting a provision of the Massachusetts law for murder committed outside the state where death occurs within the state, defines "inflicted" as any bodily harm which is caused to be suffered by the act of the accused. I, therefore, hold that the indictment properly lays venue under the aforesaid statute regarding wounds, etc. caused in one county and death ensuing in another.

Further contention is made that this statute was never intended to apply to a situation which involves death following an abortion. The terms of the statute, I believe, are broad enough to include this crime; and I do not believe that it is proper prerogative of this Court to decide that the Legis-

lature meant something other than the plain wording of the statute indicates it means.

The second point made is in that the Plea in Abatement filed in the Intermediate Court of this county objected to the trial of this Petitioner because the jurisdiction
page 18] of the Ohio County Court was in violation of the Constitution of the United States and the Constitution of the State of West Virginia.

Wherein Ohio County's jurisdiction is in violation of the Constitution of the United States, it is not pointed out in the Briefs filed. I know of no case old or recent in which the Bill of Rights have been extended to such a situation as we are faced with here. Our Supreme Court of Appeals as early as 1892 in the case of Ex Parte McNeely, 36 W. Va. 84; held that Section 3 of Artcle 3 and Amendment 6 of the Constitution of the United States did not apply in a similar situation.

The matter of the Constitution of the State of West Virginia, however, and the provision therein, which provides that "in criminal prosecutions, the accused shall have the right to a speedy trial by an impartial jury of the county in which the offense is alleged to have been committed" would appear to be in point. Were it not for Ex Parte McNeeley, I would have no hesitancy in finding that Section 612b of the Code was unconstitutional. I realize that Ex Parte McNeeley was concerned with a crime committed in Kentucky where death ensued in West Virginia and was not concerned with a crime committed wholly within the boundary of the State of West Virginia. The constitutional provision, however, would not seem to be limited to crimes committed and death occurring wholly within the state. Our constitution, it is reasonable to assume, is all encompassing.

The opinion in Ex Parte McNeeley, in its beginning, leads one to believe that ultimately our Supreme Court would have held that Logan County had no jurisdiction, but it did not do so. It laid down the principle that there were two ways of looking at the venue of the crime. One is that, while the employment or use of means is the beginning in the criminal

transaction, it is only the beginning and that death being an essential element of the crime is the end. This would appear to argue against most of the cases and the opinion of Judge Brannon as to where venue in such an page 19] instance is, at least at common law. The other, of course, is the common law rule that, where the means were employed, the wrong was done and that death was a mere consequence or result of the act.

The constitutional provision with which we are here concerned is the same constitutional provision considered in the McNeeley case. The principles contained in the McNeeley case cannot be differentiated by me from the principles contained in the Willis case. If these principles are valid in the McNeeley case, why are they not valid in the Willis case? The provision of the statute which says a person who inflicts a wound in one state on a person who dies in West Virginia, may be tried in West Virginia cannot be differentiated by me from the statute that says that a person who inflicts a wound in one county against a person who dies in another county may be triad in the county where death occurred.

I find myself in the same situation as was Judge Brannon. I too have not been able to relieve myself from serious doubts as to the constitutionality of Section 6124 of the Code of West Virginia. Although I do have doubts on the subject, I too am not permitted to forget that "a Court must be slow and cautious to overthrow Legislative action. In none but a case of very plain infraction of the Constitution where there is no escape, will or ought a Court to do so. To doubt only is to affirm the validity of its action." I must resolve my doubt in this way. I must use every reasonable construction, which can be resorted to to sustain the constitutionality of Section 6124. Not only is this principle adopted as the law of the State of West Virginia in Ex Parte McNeeley, but it has been reiterated time and time again down through the years.

The Writ prayed for will be denied.

/s/ JAMES G. McCLURE
Judge.

x x x

page 20] ORDER ENTERED OCT. 22, 1965

This matter was heretofore submitted to the Court for decision on the 23rd day of September, 1965, upon the Petition filed herein and the Demurrer thereto, upon argument of counsel and upon Briefs submitted in support of the respective contentions of the parties hereto. And the Court having considered of its opinion upon the points raised in support of the Petitioner's prayer for a Writ of Prohibition and Respondent's Demurrer thereto, hath prepared its Memorandum, copies of which have heretofore been forwarded to counsel for the respective parties herein, and which said Memorandum is hereby

ORDERED filed herein and made a part of the record of these proceedings. For the reasons assigned in

page 21] said Memorandum, the Court finds that the Demurrer of the Respondent should be and the same is hereby

ORDERED sustained. And the Court doth accordingly ORDER that the Writ of Prohibition prayed for by the Petitioner be and the same is hereby denied, and said Petition is dismissed, at costs of Petitioner.

To all of which action of the Court, the Petitioner objects and excepts.

Thereupon Petitioner gave notice that he would make application for a Writ of Error to the Supreme Court of Appeals of West Virginia and moved the Court for a stay of execution of said judgment. And there being no objection to said motion, the Court did grant said motion and did order a stay of execution of said judgment for a period of ninety-one (91) days from the date hereof.

Thereupon, the Court, for purposes of appeal, did order that the Petitioner be required to enter into bond in the penal sum of One Hundred Dollars ($100.00) conditioned according to law.

x x x

page 22] NOTICE OF INTENT TO FILE PETITION FOR APPEAL

To: The Honorable James G. McClure,
Judge of the Circuit Court of
Ohio County, West Virginia.

The undersigned petitioner respectfully represents unto the Court that:

The petitioner filed his petition for a Writ of Prohibition with this Honorable Court on the 30th day of August, 1965 and on the 30th day of August, 1965 this Honorable Court issued a Rule to Show Cause why the Writ of Prohibition should not be granted, returnable to the 23rd day of September, 1965.

That on the 22nd day of October, 1965, this Honorable Court entered an order sustaining the demurrer of the State of West Virginia to the petition of the petitioner, which order set forth the notice of application for a Writ of Error to the Supreme Court of Appeals of West Virginia.

page 23] Petitioner comes now on this 20th day of December, 1965 and files a reaffirmation of his Notice of Intent to file a petition for Writ of Error with the Supreme Court of Appeals of West Virginia with the Clerk of the Circuit Court of Ohio County, West Virginia and states as grounds for said petition the following:

1. Your petitioner filed a Plea in Abatement to the Jurisdiction of the Intermediate Court of Ohio County as Violative of the Constitution of the United States of America and the State of West Virginia.

2. Your petitioner filed a Plea in Abatement to the Jurisdiction of the Intermediate Court of Ohio County on the ground of venue.

3. Your petitioner is entitled to a trial in the County where the alleged offense was committed.

4. The Statute of the State of West Virginia giving jurisdiction of a prosecution to the Courts of a County where the offense was not committed is unconstitutional and void.

5. The Statute under which the Intermediate Court of

Ohio County is assuming jurisdiction, Chapter 61, Article 11, Section 12 of the West Virginia Code of 1961 Michie's Code Serial No. 6124, contemplates crimes of violence; whereas, the crime charged in this case is not a crime of this nature.

page 24] 6. The attempt to proceed by the Intermediate Court in this matter is a usurpation and abuse of power and exceeds the Court's powers therein, and that the Intermediate Court of Ohio County is wholly without jurisdiction to act further in said case.

DONALD G. WILLIS, Petitioner
s/ By: JEREMY C. McCAMIC
Of Messrs. Pinsky, Mahan, Barnes & Watson and Messrs. McCamic & Tinker
Counsel for Petitioner.

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page 25] CERTIFICATE

State of West Virginia,
County of Ohio, to-wit:

I, W. H. Havercamp, Clerk of the Circuit Court of Ohio County, State aforesaid, do hereby certify that the foregoing is a true transcript of the proceedings had in the action of Donald G. Willis vs. Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, lately pending in said Circuit Court, as the same appears of record in my office, and as stipulated by Counsel.

Given under my hand and the seal of said Court, this 12th day of April, 1966.

W. H. HAVERCAMP
Clerk of the Circuit Court of Ohio County, West Virginia.

(Seal Circuit Court Ohio Co., W. Va.)

Printed May 13, 1966.
Cost of Printing Record - - - - $71.30

Donald G. WILLIS

v.

Thomas P. O'BRIEN, Judge, Intermediate Court of Ohio County.

No. 12555.

Supreme Court of Appeals of West Virginia.

Submitted Sept. 21, 1966.

Decided Feb. 28, 1967.

Defendant was charged with the murder of deceased by performing an unlawful abortion upon her. Appeal was taken from a final order of the Circuit Court of Ohio County, James G. McClure, J., which denied defendant a writ of prohibition. The Supreme Court of Appeals, Caplan, J., held that where abortion was allegedly committed by defendant in Brooke County but woman on whom the abortion was performed died as result therefrom in Ohio County, defendant could be tried for murder in Ohio County even though defendant was not physically present in Ohio County when the death occurred.

Affirmed.

1. Criminal Law ⇐108(1)

A defendant has the constitutional right to be tried in the county where the crime was committed and such right cannot be abrogated, either by the courts or by statute. Const. art. 3, § 14.

2. Criminal Law ⇐108(1)

Venue lies only in the county where the crime was committed and at no other place, unless the defendant waives his right or files a motion for a change of venue. Const. art. 3, § 14.

3. Criminal Law ⇐108

Even though the presence of the accused within a county is considered essential to make his criminal act one which is done within that county, his presence may be constructive as well as actual. Const. art. 3, § 14; Code, 61-2-8.

4. Criminal Law ⇐112(6)

Where one puts in force an agency for the commission of the crime of murder resulting from unlawful abortion, he, in legal contemplation, accompanies the agency to the point where such crime becomes effectual. Const. art. 3, § 14; Code, 61-2-8.

5. Criminal Law ⇐112(6)

When an unlawful abortion is committed in one county and death results therefrom in another county, venue lies, under an indictment for murder, in either county. Const. art. 3, § 14; Code, 61-2-8.

6. Criminal Law ⇐112(6)

Where abortion was allegedly committed by defendant in Brooke county but woman on whom the abortion was performed died as result thereof in Ohio county, defendant could be tried for murder in Ohio county even though defendant was not physically present in Ohio county when the death occurred. Const. art. 3, § 14; Code, 61-2-8.

7. Criminal Law ⇐107

Statute providing that if mortal wound is inflicted in one county, and death ensues therefrom in another county, the offense may be prosecuted in either county is not unconstitutional by reason of constitutional provision which requires the trial of the crime in the county where the alleged offense was committed. Const. art. 3, § 14; Code, 61-11-12.

8. Constitutional Law ⇐48

If an act is susceptible of two constructions, the one giving validity thereto should be adopted.

9. Constitutional Law ⇐48

When the constitutionality of statute is questioned, every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality.

and any doubt must be resolved in favor of the constitutionality of the legislative enactment.

10. Criminal Law ⇐112(6)

The legislature in enacting statute authorizing prosecution of offense in county where mortal wound was inflicted or in county where death ensued therefrom, did not provide that an accused may be tried in a county other than that in which he was alleged to have committed the offense, but rather provided that he may be tried where the blow was rendered or, if death resulted therefrom, at the place where death occurred. Code, 61-2-8, 61-11-12.

11. Statutes ⇐212.1

The Supreme Court presumed that the Legislature, in adopting statute authorizing prosecution of offense in county where mortal wound was inflicted or in county where death ensued therefrom, was cognizant of constitutional provision requiring trial of crime in the county where the alleged offense was committed, and intended to abide by its provisions. Code, 61-2-8, 61-11-12; Const. art. 3, § 14.

Syllabus by the Court

1. Where one puts in force an agency for the commission of the crime of murder resulting from unlawful abortion, he, in legal contemplation, accompanies the agency to the point where such crime becomes effectual.

2. When an unlawful abortion is committed in one county and death results therefrom in another county, venue lies, under an indictment for murder, in either county.

3. When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment.

Pinsky, Mahan, Barnes & Watson, Wellsburg, McCamic & McCamic, Wheeling, for plaintiff in error.

C. Donald Robertson, Atty. Gen., Leo Catsonis, Asst. Atty. Gen., Charleston, for defendant in error.

CAPLAN, Judge:

This is an appeal from a final order of the Circuit Court of Ohio County which denied the petitioner, Donald G. Willis, a writ of prohibition. On April 29, 1965, at a special term of the grand jury attending the Intermediate Court of Ohio County, West Virginia, the petitioner, Donald G. Willis, was indicted for murder. The indictment charges that Donald G. Willis on March 23, 1965, in Ohio County, "feloniously, wilfully, maliciously, deliberately and unlawfully did slay and kill, and murder one Evelyn Riedel Sherman, in that on the 22nd day of March, 1965, in Brooke County, West Virginia, the said Donald G. Willis did feloniously, wilfully and unlawfully employ and use upon the body of the said Evelyn Riedel Sherman, a female person, who was then and there pregnant with child, certain means, the character and description of which are to the grand jurors aforesaid unknown, with intent then and there to destroy such unborn child of the said Evelyn Riedel Sherman & to produce the abortion and miscarriage of said Evelyn Riedel Sherman * * *;". The indictment, after alleging that the abortion was not performed with the intention of saving the life of the mother or child, further states "and by reason of such abortion performed on her the said Evelyn Riedel Sherman did die in Ohio County, West Virginia on the 23rd day of March, 1965 * * *"

On May 28, 1965 the petitioner filed a plea in abatement alleging that a trial on this indictment in Ohio County would constitute a violation of the constitutional provision assuring a defendant the right to be tried in the county where the offense was committed. The petitioner in a further plea

in abatement alleged that the indictment failed to set forth that any mortal wound or other violation or injury was inflicted or administered in Brooke County.

By order dated June 14, 1965, the Intermediate Court overruled the petitioner's pleas in abatement and the case was set for trial. Donald G. Willis, on August 30, 1965, filed his petition for a writ of prohibition in the Circuit Court of Ohio County whereby he sought to prohibit the Honorable Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, from proceeding with a trial on this indictment. A rule was granted and the matter was fully heard. By order, dated October 22, 1965, a judgment was entered denying and dismissing the petition. It is from that judgment that this appeal is now being prosecuted.

Although subsidiary questions have been raised, the principal issue involved is whether the petitioner, in the circumstances of this case, may be tried in Ohio County. Venue, not jurisdiction, is our concern here. Jurisdiction is a constitutional endowment of power to hear and determine a cause. Thus, any court authorized by the Constitution, or a statute enacted pursuant thereto, to hear and determine a case involving a criminal act has jurisdiction thereof. Venue, on the other hand, is merely the place of trial. It designates the particular county in which a court having jurisdiction may properly hear and determine the case. 19 M.J. Venue § 2.

In the instant case the Intermediate Court of Ohio County unquestionably has jurisdiction to try a defendant on a charge of murder. Whether Ohio County is the proper venue for such trial is the question squarely presented in this proceeding.

[1,2] Article III, Section 14 of the Constitution of West Virginia provides, in part, "Trials of crimes * * * shall be * * * in the county where the alleged offence was committed * * *." A defendant is thereby afforded a constitutional right to be tried in the county where the crime was committed and such right cannot be abrogated, either by the courts or by statute. Consequently, this court in State v. Lowe, 21 W.Va. 782, held unconstitutional and void a statute which authorized prosecution for a crime in a county in which the offense was not committed but which was committed within one hundred yards of the boundary line of the county. It becomes clear, therefore, that venue lies only in the county where the crime was committed and at no other place, unless the defendant waives his right or files a motion for a change of venue.

It is the primary position of the petitioner that, in view of the mandate in Article III, Section 14 of the Constitution of West Virginia, he must be tried in Brooke County, the county in which the abortion was allegedly committed. The threshold question, therefore, is to determine where the offense charged in the indictment was committed. In making this determination it is essential to consider, not only the language of the above constitutional provision, but also the indictment, the statute under which such indictment was returned and the statute employed in aid of this prosecution.

As herein noted, the indictment charges that Donald G. Willis did slay, kill and murder Evelyn Riedel Sherman in Ohio County by performing an unlawful abortion upon her in Brooke County. The statute under which this prosecution was instituted provides, in part: "Any person who shall administer to, or cause to be taken by, a woman, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, shall be guilty of a felony * * *; and if such woman die by reason of such abortion performed upon her, such person shall be guilty of murder * * *." Code, 1931, 61-2-8.

This legislative enactment creates a statutory felony, criminal abortion at common law having been only a misdemeanor. Smith v. State, 33 Me. 48, 54 Am.Dec. 607; Worthington v. State, 92 Md. 222, 48 A. 355, 56 L.R.A. 353; Commonwealth v. Trombetta, 131 Pa.Super. 487, 200 A. 107; 2 Wharton's Criminal Law and Procedure, Section 737. However, this statute further provides that if the one upon whom the abortion was performed dies as a result thereof, the perpetrator of the abortion shall be guilty of murder. Thus, separate crimes are created by Code, 1931, 61-2-8, it being only when the woman dies by reason of the unlawful abortion that the crime of murder is committed. State v. Lewis, 133 W.Va. 584, 57 S.E.2d 513.

Looking again to the indictment in the instant case, we must consider what offense was charged. The petitioner was not accused of the offense of unlawful abortion. He was charged with the offense of murder. The performance of the abortion of which he was guilty, if proved, occurred in Brooke County, but the death, making complete the offense of murder, as charged in the indictment, occurred in Ohio County. Under the provisions of Code, 1931, 61-2-8, the petitioner could not have committed murder unless and until death occurred as a result of his act. When such death occurred he committed the murder, provided the essential elements be proved in a proper trial.

[3, 4] It is argued that the petitioner, Willis, could not have committed murder in Ohio County for the reason that he was not physically present in that county when the death occurred. There is substantial authority for the proposition that even though the presence of the accused within a county is considered essential to make his criminal act one which is done within that county, his presence may be constructive as well as actual. The theory of the law upon which this proposition is based is where one puts in force an agency for the commission of a crime, he, in legal contemplation, accompanies the agency to the point where it becomes effectual. See 21 Am.Jur.2d, Criminal Law, Section 386.

[5, 6] In the instant case if the petitioner did in fact perform an unlawful abortion, he put in force an agency which, under the statute, could result in the crime of murder. In accordance with the foregoing theory he accompanied the agency to Ohio County, the point where the crime of murder became effectual. We are of the opinion, therefore, that the offense charged in the indictment was committed in Ohio County. See Hauk v. State, 148 Ind. 238, 46 N.E. 127, 47 N.E. 465; People v. Southwick, 272 Mich. 258, 261 N.W. 320.

The petitioner attacks as unconstitutional Code, 1931, 61-11-12, upon which the state further relies for placing venue of this case in Ohio County. That statute provides:

> "If a mortal wound or other violence or injury be inflicted, or poison be administered, in one county, and death ensue therefrom in another county, the offense may be prosecuted in either."

It is contended that such statute is contrary to our constitutional provision which requires the trial of a crime in the "county where the alleged offence was committed." Unlike the statute in effect when State v. Lowe, 21 W.Va. 782, was decided, Code, 1931, 61-11-12 does not provide that an offense may be prosecuted in a county other than that in which it was committed. It is a remedial statute and should be construed liberally to accomplish the purpose for which it was enacted. Esque v. City of Huntington, 104 W.Va. 110, 139 S.E. 469, 54 A.L.R. 785; Hasson v. City of Chester, 67 W.Va. 278, 67 S.E. 731; 17 M.J. Statutes, Section 72. That purpose is to correct the unreasonable principle established under the ancient common law to the effect that if a person were stricken in one county and died therefrom in another, he could be prosecuted in neither. Realizing the inequity of this situation, legislative bodies

began to adopt remedial legislation. The statute under consideration is an example of such legislation.

Although our research reveals that the constitutionality of Code, 1931, 61–11–12 has never been challenged, it was held in State v. Bragg, 140 W.Va. 585, 87 S.E.2d 689: "Under Code, 61–11–12, the venue for murder lies in the county where the fatal injury is inflicted, or if death occurs in another county, venue also lies in such other county." In McNeeley ex parte, 36 W.Va. 84, 14 S.E. 436, 15 L.R.A. 226, there was much dicta to the effect that the prosecution should take place where the blow was inflicted rather than where the death occurred. However, the Court held that under Chapter 144, Section 6 of the Code the place of death was the proper venue of the trial. The statute then in effect, while relating to a stroke rendered out of the state and death therefrom occurring in the state, embraced the same principle as that now found in Code, 1931, 61–11–12.

[7–9] Having concluded herein that the offense was committed in Ohio County, the place where the death occurred, we hold untenable the contention that Code, 1931, 61–11–12 is unconstitutional. Furthermore, there is a presumption that the legislature in the passage of an act considered the Constitution and did not intend to violate it. If an act is susceptible of two constructions the one giving validity thereto will be adopted. Therefore, every reasonable construction must be resorted to by a court in order to sustain constitutionality and any doubt must be resolved in favor of the constitutionality of the legislative enactment in question. State ex rel. Battle v. B. D. Bailey & Sons, Inc., 150 W.Va. 37, 146 S.E.2d 686; State ex rel. Appalachian Power Company v. Gainer, 149 W.Va. 740, 143 S.E.2d 351; State ex rel. Slatton v. Boles, 147 W.Va. 674, 130 S.E.2d 192; McNeeley ex parte, 36 W.Va. 84, 14 S.E. 436, 15 L.R.A. 226; 17 M.J. Statutes, Section 29 et seq.

[10] As noted above, the legislature did not, in enacting Code, 1931, 61–11–12, provide that an accused may be tried in a county other than that in which he was alleged to have committed an offense. It provided that he may be tried where the blow was rendered, or, if death resulted therefrom, at the place where the death occurred. The legislature said, in effect, that the offense of murder was committed where the mortal injury was inflicted or where the death, resulting from such injury, occurred. By so interpreting this statute we perceive no manner in which violence is done to an accused's constitutional rights.

[11] We must presume that the legislature in adopting this statute, was cognizant of Article III, Section 14 of the Constitution of West Virginia and intended to abide by its provisions. Considering the remedial purpose of this statute and the pertinent constitutional provision, we hold that no authority was granted by the statute to prosecute a defendant in a county other than that in which the offense was committed. Even if the language of the statute were not entirely clear, as related above, any doubt will be resolved in favor of the constitutionality thereof. The court said in Syllabus No. 1, in Hasson v. City of Chester, 67 W.Va. 278, 67 S.E. 731, "That which is plainly within the spirit, meaning and purpose of a remedial statute, though not therein expressed in terms, is as much a part of it as if it were so expressed."

We have carefully examined and considered the other assignments of error relied upon by the petitioner and have concluded, in view of our holding herein, that they are without merit.

For the reasons stated in this opinion, the judgment of the Circuit Court of Ohio County is affirmed.

Affirmed.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 28th day of February, 1967, the following order was made and entered, to-wit:

Donald G. Willis, Petitioner Below, Plaintiff in Error

vs.

Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, Respondent Below, Defendent in Error

Upon a writ of error and supersedeas to a judgment of the Circuit Court of Ohio County rendered on the 22nd day of October, 1965.

The Court, having maturely considered the transcript of the record herein, and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is no error in said judgment. It is therefore considered and ordered by the Court that the judgment of the Circuit Court of Ohio County rendered in this proceeding on the 22nd day of October, 1965, be, and the same is hereby affirmed, and that the defendant in error do recover of and from the plantiff in error his costs about his defense in this Court in this behalf expended, and Thirty Dollars damages: all of which is ordered to be certified to the Circuit Court of Ohio County.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Judge Caplan, was concurred in by Judges Calhoun, Haymond, Browning and Berry.

A True Copy

Attest: .....

Clerk Supreme Court of Appeals

NO. 12555

IN THE

Supreme Court of Appeals

OF

West Virginia

CHARLESTON

DONALD G. WILLIS,
Petitioner Below, Plaintiff in Error,

vs.

THOMAS P. O'BRIEN, Judge of the Intermediate Court of Ohio County, West Virginia
Respondent Below, Defendant in Error

FROM THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

PROHIBITION

PLAINTIFF IN ERROR'S PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

To the Honorables, the Judges of the Supreme Court of Appeals of West Virginia:

The Plaintiff in Error, Donald G. Willis, respectfully applies for a rehearing on the Writ of Error and Supersedeas issued by this Honorable Court on the 28th of February, 1966 to the final judgment of the Circuit Court of Ohio

County, West Virginia, rendered against him by dismissing his petition for a writ of prohibition by an order dated the 22nd of October, 1965.

On the 28th of February, 1967, this Honorable Court affirmed the judgment of the Circuit Court of Ohio County for the reasons stated in the Opinion of this Honorable Court rendered that day. The purpose of this application for rehearing is not an exercise in the perfunctory routine of a disappointed litigant or his counsel; but to the contrary, has for its sincere objective, it is most respectfully submitted, the prevention of the application of a body of law which the Court's own citation unmistakeably shows that it does not apply. This Court's opinion is based upon a conception that is completely erroneous and without legal authority in support thereof. Its principal underpinning is expressed in point 1. of the Syllabus as follows:

> "1. Where one puts in force an agency for the commission of the crime of murder resulting from unlawful abortion, he, in legal contemplation, accompanies the agency to the point where such crime becomes effectual."

The Court cites in support thereof, 21 Am. Jur. 2nd, Criminal Law, § 386. Even a mere cursory reading of § 386 *in its entirety* would indicate the complete inapplicability of § 386 to the facts of the Willis case. The last paragraph of § 386 containing a two line paragraph destroys the basic structure of the Court's opinion. The words of this last paragraph are as follows:

> "Jurisdiction in homicide cases where the fatal blow is struck in one county or state and death results in another is treated in detail in another article."

The footnote on page 406 of 21 Am. Jur. 2nd, pertinent to the two line paragraph refers to "See Homicide (1st ed § 238)." The impact of § 238 found in 26 Am. Jur.,

Homicide, page 320, is fully dicussed in our main brief beginning with the second paragraph of the Argument on page 9 thereof.

The plain language of the Court's own citation of § 386, 21 Am. Jur. 2nd, Criminal Law, if read through to its *complete end* would disclose at once to both bench and bar its absolute irrelevancy, immaterality and misapplication to the facts of the Willis case. It is most respectfully submitted that the two line paragraph of § 386 undercuts the rationale of this Court's opinion of February 28, 1967 and vitiates the basic postulate upon which the Court's opinion turns.

It cannot be urged too strongly that the error of this Court is borne out by analysis of the main case cited in the footnote on page 405 of 21 Am. Jur. 2d, Criminal Law, § 386, i.e. *Simpson* v. *State*, 92 Ga. 41, 17 SE 984. In that case, one Davis was standing upon the bank of the Savannah River in South Carolina. The victim was riding in a boat on the Savannah River in Georgia. Davis fired shots that landed in the water near the victim. Davis was tried in Georgia for the offense of "shooting at another." The legal issue involved was whether any effect of this shooting took place in the state of Georgia inasmuch as the victim was not struck. Thus the issue raised was did Georgia have jurisdiction to try Davis for "shooting at another"? The Court in holding that Georgia could try Davis applies the force agency theory that this Court uses in the Willis case. The Georgia court said that "If a man in the state of South Carolina criminally fires a ball into the state of Georgia, the law regards him as accompanying the ball and as being represented by it *up to the point where it strikes.*"

The Georgia court goes on to state that "*There is however a clear distinction between cases like the one just cited where a wound is inflicted in one jurisdiction and death ensues in another and the cases like the present where the accused in*

one state puts in operation a force which takes effect in another." Citing Justice Campbell in *Tyler v. People,* 8 Mich. 320, the Georgia court went on to quote him as follows: "The doctrine of constructive presence is not applicable" in the case at bar referring to the instance where a wound is inflicted in one jurisdiction and death ensues in another. Justice Campbell then continued "A wounding must of course be done where there is a person wounded and the criminal act is *the force against* his person. That is, the immediate act of the assailant, whether he strikes with a sword or shoots a gun and he may very reasonably be held present where his forceable act becomes directly operative."

Another point prominently cited by this Honorable Court in its opinion in referring to the aforesaid § 386, 21 Am. Jur. 2d, Criminal Law, is "that even though the presence of the accused within a county is considered essential to make his criminal act one which is done within that *county,* his presence may be constructive as well as actual." In referring to this section one finds that there is a very important word that is used in that section that has an askewing substitute when quoted by this Honorable Court. That word is "*state*". This pertinent portion of § 386 is as follows:

> "Although the presence of the accused within a *state* is considered essential to make his criminal act one which is done within that state" by citing as authority *Simpson* v. *State,* supra, "such presence need not be actual; it may be constructive."

The case of *U. S.* v. *Johnston,* (CA3 Pa.) 227 Fed. 2d 745, is cited in the footnote. In this case, the defendants, Johnston and Sokol were residents of the western district of Pennsylvania when they were ordered to report for military duty at a hospital in the eastern district of Pennsylvania. Upon their failure to so report as required, they were indicted in eastern Pennsylvania for failure to discharge their duty of reporting in eastern Pennsylvania. The question raised

was whether the eastern district federal court of Pennsylvania had venue in prosecuting for violations of the provisions of the Universal Military Training and Service Act. In holding that prosecution may be so had, the court used as one of its examples the standard illustration of where a shot is fired in one state and death occurs in another where the victim was standing. The court there stated that an offense is complete *where the fatal force hits the victim.* The court then stated that in the case before it, the law as defined there imposes a duty on the defendant to do an act which he failed to do, that is, appear in eastern Pennsylvania.

In sum, the force agency theory is in no wise applicable to the Willis case. The fatal wound, blow or ministration allegedly by Willis, occurred in Brooke Count only. The application of the force agency theory indicated in § 386 of Am. Jur. and the authority cited in support thereof, bears no relation to these set of facts. Undoubtedly poison sent through the mail from one county to another or a hand grenade carried from one county to another, the ministration or wound or blow being struck in the county other than the forwarding one, is what § 386 is aiming at or has in mind, which certainly are not the facts alleged in the Willis case.

It is respectfully submitted that this Honorable Court has failed to grasp the thrust of the Plaintiff in Error's arguments. Reduced to an absolute simplicity, it is this. West Virginia blindly copied the Virginia venue statute in enacting Chapter 61, Article 11, § 12 when it achieved statehood. Virginia's constitution at that time provided that the accused must be tried *in the vicinage* where the crime is alleged to have been committed. The Legislature of West Virginia at that particular time in blindly copying the Virginia statute, it is assumed, overlooked the organic law of our state that provides that an accused is guaranteed a trial *in the county* where the alleged offense was committed, Article III, § 14 of the Constitution of West Virginia. Plain-

tiff in Error raised a plain and unambiguous issue. Constitutions of other states were cited as well as cases pertinent thereto, analyzed in our main and reply brief. This Court in its opinion refers to the Indiana case of *Hauk* v. *State,* 148 Ind. 238, 46 NE 127, *People* v. *Southwick,* 272 Mich. 258, 261, NW 320. As shown on page 7 of the Plaintiff in Error's reply brief, both of these cases completely missed the mark and contributed nothing to the question. As pointed out in the reply brief, the Michigan Constitution contains *no limiting provision as to venue and in Indiana, there are no common law crimes, Indiana law being entirely statutory and not of common law origin.*

We respectfully remind this Honorable Court that the Circuit Court of Ohio County, in its opinion, made part of the record and appearing on page 24 thereof, states "Were it not for *Ex Parte McNeeley,* I would have no hesitancy in finding that § 6124 of the Code was unconstitutional." In Plaintiff in Error's main brief, beginning on page 31 thereof, the McNeeley case was thoroughly discussed. In McNeeley, there was involved the jurisdictional question between two sovereignties, West Virginia and Kentucky. Here jurisdiction is not questioned. The only issue is which of two counties in West Virginia, Ohio and Brooke, constitutionally has venue.

The Attorney General in his reply brief for the Defendant in Error responded with multiple offense statutes, the answer to which was fully made in our reply brief. The Attorney General did not, even tangentially, raise the agency force theory in his brief or oral argument before this Court. Nor did the Plaintiff in Error. It surfaced for the first time sua sponte in this Honorable Court's opinion of February 28, 1967. While it undoubtedly may make good law absent state constitutional provisions and common law barriers, its application to the Willis case is for the reasons above set forth, plainly wrong and unjustified, it is most respectfully submitted.

If for no other reason than to correct this palpable error of law on the pivotal point of the Court's opinion, a rehearing should be granted. It is respectfully submitted that this Honorable Court's imprimatur should not be embellished in its permanent opinion where the plain language of the Court's own citation, i.e., 21 Am. Jur. 2d, Criminal Law, § 386, would disclose if read through to its complete end, its misapplication to the facts of the Willis case.

WHEREFORE, the Plaintiff in Error prays for a rehearing on the Writ of Error and Supersedeas issued by this Honorable Court on the 28th of February, 1966 to the final judgment of the Circuit Court of Ohio County, West Virginia rendered against him by dismissing his petition for a writ of prohibition by an order dated the 22nd of October, 1965.

Respectfully submitted,

PINSKY, MAHAN, BARNES & WATSON
of Wellsburg, West Virginia

McCAMIC & McCAMIC
of Wheeling, West Virginia

Counsel for Plaintiff in Error

(All italics ours.)

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 29th day of May 1967, the following order was made and entered, to-wit:

Donald G. Willis, Petitioner Below, Plaintiff in Error

vs.

Thomas P. O'Brien, Judge of the Intermediate Court of Ohio County, West Virginia, Respondent Below, Defendent in Error

The Court, having maturely considered the petition for rehearing and reargument filed in the foregoing proceeding, is of opinion to, and doth deny the prayer of the petition and doth order that the final order entered herein be made absolute and certified as heretofore directed. Judge Browning absent.

A True Copy

Attest: .....
Clerk Supreme Court of Appeals